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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA,
As Owner of the U. S. N. S. HAITI VICTORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order and opinion of the District Court (Pet. App. 1, 2) dismissing cross claims against petitioner are not reported. The opinion of the District Court (Pet. App. 3–10) exonerating the United States from liability is reported at 131 F. Supp. 712. The opinion of the Court of Appeals (Pet. App. 12–22) is reported at 230 F. 2d 139.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1956. By order of the Chief Justice, signed on April 10, 1956, the time for filing a petition for a writ of certiorari was extended to

July 12, 1956. The petition for a writ of certiorari was filed on July 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, both lower courts erred in finding that the United States, as owner of the U. S. N. S. *Haiti Victory*, was free from fault in a collision of the *Haiti Victory* with petitioner's vessel, *The Duke of York*.

2. Whether the Court of Appeals was correct in holding that claimants in an admiralty liability limitation proceeding could cross-claim against another claimant in the same proceeding for damages arising from the same occurrence.

STATUTES AND RULES INVOLVED

The navigational rules pertinent to this proceeding are set forth at pages 3–5 of the petition.

STATEMENT

Petitioner is a claimant in a proceeding brought in the District Court for the Eastern District of Virginia by the United States as owner of the Naval Transport *Haiti Victory* (hereafter called *Haiti*) for exoneration from or limitation of liability for loss or damage resulting from a collision between that vessel and the overnight ferry, *Duke of York* (hereafter called *Duke*), owned by petitioner, on May 6, 1953, in the North Sea (Pet. App. 3). During the pendency of the proceedings, other claimants against the *Haiti* filed cross-claims against the *Duke* to recover for death, personal injury, and loss of baggage (Pet. App. 1). The District Court, in a memorandum opinion,

held that the claimants could not cross-claim against another claimant, such as petitioner, and dismissed the cross-claims (Pet. App. 1, 2). Subsequently at the trial of the limitation proceeding, the District Court exonerated the United States from all liability, holding the *Duke* solely to blame for the collision (Pet. App. 3–10). Petitioner and the other claimants then appealed to the Fourth Circuit which sustained the District Court in finding the *Duke* solely at fault, but reversed the District Court's order refusing to hear cross-claims between claimants in a limitation proceeding (Pet. App. 12–22). All claimants seek review by this Court.[1]

The facts found by both the District Court and the Court of Appeals may be summarized as follows:

The *Duke* left the Hook of Holland bound west across the North Sea for Harwich, England, a few minutes after midnight, May 5, 1953 (Pet. App. 4). She continued to make full speed through intermittent heavy fog up to the time of the collision (Pet. App. 4, 6), although her radar equipment had failed a short time after she got under way. That the *Duke* was at fault was not seriously contested below (Pet. App. 13).

The *Haiti* had taken on a Trinity House pilot at Dover at 1:17 a. m. of the same morning and was steaming northwest up the channel in clear weather with no fog visible (Pet. App. 4, 8). When she passed

[1] The passenger claimants have filed a petition for a writ of certiorari from that part of the Court of Appeals judgment exonerating the *Haiti* from liability. *Arthur Goodman et al.* v. *United States*, No. 249.

abeam of Galloper Lightship at 4:14 a. m. (Pet App. 5, 8), the *Haiti's* mate turned on the ship's radar (which was located on the bridge and had been placed on standby two hours earlier) and took a bearing on the lightship, but did not look for, or see, any indication of the *Duke* (Pet. App. 9). Soon thereafter, the *Haiti's* forward lookout reported a whistle off the starboard bow. The pilot, after looking in the direction of the sound and seeing nothing, went to the radar and saw a target on his starboard bow, and immediately (at approximately 4:15 a. m.) stopped the *Haiti's* engines (Pet. App. 5).

The *Duke* was running at full speed on a westerly course through a thick fog bank completely invisible to the *Haiti's* crew, when her lookout saw the *Haiti's* lights one quarter mile away. Both vessels went full astern in the succeeding half minute, but were unable to avoid a collision in which the *Haiti's* stem penetrated the *Duke's* port bow, causing the loss of several lives and substantial property damage.

The District Court found that the *Duke* violated Article 16 of the International Rules (33 U. S. C. 145n; Pet. 5) in maintaining full speed through thick fog, and that this violation was "an overriding and major fault" which was the "predominant" cause of the collision (Pet. App. 7, 9). The court found that the *Haiti's* pilot had no reason to suspect the fog enshrouding the *Duke* until collision was imminent (Pet. App. 8), and that in the circumstances he was not negligent in keeping his radar on standby to conserve its working life, since he had no "notice of any need for it" (Pet. App. 9). The Court of Appeals

affirmed the District Court's findings of fact (Pet. App. 12–22).

ARGUMENT

The issues raised by the petition as to the *Haiti's* freedom from fault are factual in nature and were resolved against petitioner by both lower courts. The Fourth Circuit's decision allowing cross-claims in limitations proceedings is clearly correct and is supported by a recent decision of the Second Circuit. There is no conflict of decisions, and hence no occasion for review by this Court.

1. Petitioner argues (Pet. 30–36) that the decision below, exonerating the *Haiti* from fault for failure to consult her radar prior to the collision, is in conflict with several decisions, including one by the Second Circuit. Each of the cases relied on by petitioner, however, involved a vessel which failed to use its radar after some prior warning, either of a possibility of collision or that it could no longer rely on visual lookout.

Thus, *The Medford,* 65 F. Supp. 622 (E. D. N. Y.), and *The Esso Plymouth,* [1955] 1 Lloyd's L. Rep. 429, concerned vessels which knowingly entered fog or smoke banks at full speed without utilizing an available radar instrument. Similarly, *United States* v. *The Australia Star,* 172 F. 2d 472 (C. A. 2), certiorari denied, 338 U. S. 823, held blameworthy a vessel which did not continue to use her radar after repeated notice that a collision with an unlighted ship might be imminent. The Fourth Circuit's holding in this case, far from conflicting with these earlier decisions, recognized their validity (Pet. App. 17) but held that

the *Haiti* had received no such warning in this case. More specifically, the Fourth Circuit affirmed the District Court's finding that the *Haiti* had no reason to believe that it was near fog or that it could not safely rely on visual lookout. Since petitioner admits (Pet. 35, 36) that it is bound by that holding, the distinction between the cases cited by petitioner and the present decision is clear.

Seeking, however, to avoid the effect of the holding, petitioner argues (Pet. 38, 39) that the ever-present possibility of fog in the collision area was sufficient to require the radar-equipped *Haiti* to make use of her instrument, if not constantly, at least at frequent intervals.[2] Petitioner thus not only attempts to undercut indirectly the lower court's find-

[2] Petitioner's argument (Pet. 25–28) that the *Haiti* should have anticipated fog in the vicinity of Galloper Lightship skirts gingerly around the grounds for the lower courts' finding to the contrary. The District Court and the Fourth Circuit found: (1) that visibility was "excellent" at all times after the *Haiti* left Dover; (2) when the *Haiti* reached the vicinity of Galloper Lightship shortly before the collision, she sighted the light immediately; (3) a vessel *coming from the same direction as the Duke* was "plainly seen when as much as four or five miles eastward" only two minutes prior to the collision; (4) Galloper did not report a cloudy condition (not fog) until one half hour after the collision; and (5) vessels in the vicinity reported good visibility prior to and after the collision (Pet. App. 6, 8, 16, 17). It was in these circumstances that the pilot switched the *Haiti's* radar to standby approximately two hours prior to the collision to conserve the life of its cavity magnetron (Pet. App. 16). The Court of Appeals stated that (Pet. App. 16) "It was proved that the delicate cavity magnetron of the *Haiti* radar has a short life, so that the actual use of the radar must be carefully rationed." As petitioner recognizes, it is bound by the finding of the two lower courts that the *Haiti* had no reason to believe that it could not rely on visual lookout.

ing that the *Haiti* had no reason to anticipate poor visibility, but also seeks to place a duty on all radar-equipped vessels to make use of their instruments when operating at night, for the presence of fog, haze, or smoke obscuring visibility can never be entirely discounted at sea.

Far from being a departure from established principles, the decision below is merely an application of well-settled rules that a ship is not unseaworthy because of a failure to carry radar, nor at fault because of neglect to use it, except in circumstances where it has notice of danger which that use might serve to avoid. See *The Prins Alexander* [1955], 2 Lloyd's L. Rep. 1 (House of Lords); *The Southport,* 82 Lloyd's L. Rep. 862; *The Triton-Baranof,* 1953 AMC 393; 1956 AMC 967 (Sup. Ct. Canada). *United States* v. *The Australia Star,* 172 F. 2d 472, 476 (C. A. 2), certiorari denied, 338 U. S. 823; *Pocahontas Steamship Co.* v. *The Esso Aruba,* 94 F. Supp. 486, 490 (D. Mass.), affirmed, 197 F. 2d 422 (C. A. 1); *Anglo-Saxon Petroleum Co.* v. *United States,* 88 F. Supp. 158 (D. Mass.); *Wood* v. *United States,* 125 F. Supp. 42, 51 (S. D. N. Y.). Moreover, since the collision would not have occurred in the absence of the *Duke's* extreme and overriding fault, implicit in petitioner's argument is the contention that the *Haiti* should have anticipated and guarded against violations of the rules of navigation on the part of other vessels—a standard of care rejected by American courts. *Bradshaw* v. *The Virginia,* 176 F. 2d 526, 530 (C. A. 4); *The Kaiserin Maria Theresa,* 149 Fed. 97,

99 (C. A. 2), certiorari denied *sub. nom. Palson* v. *North German Lloyd*, 204 U. S. 671.

What petitioner actually asks, therefore, is that this Court impose an entirely new navigational rule on seagoing vessels (as distinguished from vessels operating in coastal or inland waters). No admiralty court has yet gone so far as to require the use of radar in clear weather. And an accurate evaluation of such a requirement would necessitate the resolution of a variety of complex international and technical problems, many of which are still under study. Under these circumstances, and in view of the findings of both lower courts that the *Haiti* was not at fault, we submit that this Court should not undertake to decide whether the new rule proposed by petitioner should be adopted.[3]

[3] Petitioner's discussion of the utility of radar (Pet. 38, 39) amounts to an oversimplification of a very complex question. Although a useful ranging device, radar can be a dangerous substitute for vigilant lookout and ordinary seamanship (as recent charges stemming from the *Andrea Doria* disaster may illustrate). See *The Cause of Collisions at Sea with Radar*, 8 Journal Institute of Navigation (London 1955), pp. 124, 125; 8 Merchant Marine Council Proceedings (1951), p. 199; Wylie, *Use of Radar at Sea*, Institute of Navigation (London 1953), *passim;* Williams & Bartlett, *Visibility on Cathode Ray Tube Screens; Problems and Methods*, 25 Journal of Psychology (1948), p. 402. *United States* v. *Beck*, 1954 AMC 765 (D. N. J.). Radar is chiefly useful in situations of poor visibility, for its resolving power in clear weather is far inferior to the human eye. Isbister, E. J., *New Marine Radar*, Radio Technical Commission for Marine Services Proceedings (Boston 1954), p. 31.

Moreover, it is only a step (but we think, a logically necessary step) from requiring a radar-equipped vessel to use her instrument at all times after dark to a requirement that all seagoing vessels be equipped with radar. While this innovation may come in time, imposition of such a requirement, involving as it does the resolution of difficult technical issues, should better be left to Congress or international regulatory bodies.

2. Petitioner's second contention (Pet. 40–46), that the *Haiti* violated the rule (Article 16; Pet. 5) requiring a vessel that hears a fog signal forward of her beam to stop her engines "so far as the circumstances of the case admit" involves only a question of fact and requires little discussion.

Both lower courts held that the *Haiti's* pilot acted promptly and in compliance with Article 16 in stopping his vessel's engine after identifying the *Duke's* whistle off his starboard bow. As petitioner itself recognizes in another context (Pet. 35, 36), the lower courts' findings are conclusive on it here. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 99; *Just* v. *Chambers*, 312 U. S. 383, 385; *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 13; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 63.

It is clear in any case that the *Haiti's* pilot, in stopping the vessel's engine within a matter of seconds after the whistle was heard, acted in compliance with Article 16, for the language of that Article recognizes that each situation must be governed by its particular facts and presupposes at the very least a reasonable opportunity to identify a noise heard. *The Umbria*, 166 U. S. 404; *Johnston-Warren Lines* v. *United States*, 196 F. 2d 689 (C. A. 2); *Steffens* v. *United States*, 32 F. 2d 206 (C. A. 2).[4]

[4] Compare *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291 (affirming that a ship's master violated Article 16 in wasting sixteen minutes before stopping his engines after first hearing a fog signal), and *The Silver Palm*, 94 F. 2d 754, 776 (C. A. 9) (holding the commodore of a naval flotilla, proceeding at eighteen knots through a dense fog bank in "reckless disregard of other vessels," violated Article 16 in reducing his speed to only twelve knots on hearing a whistle ahead in the fog).

3. Petitioner also contends (Pet. 8–24) that the Court of Appeals erred in holding that, under Rule 56 of the Admiralty Rules, one claimant in a limitation proceeding can cross-claim against another for damages arising out of the collision or other occurrence involved in the same proceeding. In particular, petitioner asserts that the decision below is in conflict with the Fifth Circuit decision in *Department of Highways of State of Louisiana* v. *Jahncke*, 174 F. 2d 894. We believe that the decision below, which is supported by a recent holding of the Second Circuit in *Moore-McCormack Lines, Inc.* v. *McMahon* (No. 23960, June 29, 1956), is entirely reconcilable with the *Jahncke* case, and that the court below reached the only result consistent with this Court's decisions and modern procedural practice.[5]

The limitation proceeding provided by 46 U. S. C. 181 *et seq.* was characterized by this Court in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 215–218, as having two purposes: (a) to permit the shipowner, if found liable, to establish his eligibility for the liability limitation provided by federal law; (b) to provide a forum where all

[5] The United States did not file a cross-claim against the *Duke* for damage to its vessel because its counsel were of the opinion that it had waived recovery of any claim against a vessel of the British Government as a result of the "Knock for Knock" Agreement between the United States and the United Kingdom, 56 Stat. 1780, E. A. S. 282, December 4, 1942. Subsequently, while the appeal was pending, the British Government through official channels informed the United States that it does not regard the *Duke* as a Government vessel. Accordingly, following the Court of Appeals decision, the United States, relying on that holding, filed a cross-claim against the *Duke* in the proceedings before the District Court.

persons interested in a collision or other marine accident can obtain a "settlement of the whole controversy over such losses as are comprehended within it" (*id.* at 215–216). Cf. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 415, 416. It is the latter purpose which is furthered by the ruling below.

In the *Hartford Accident* case, *supra*, unanimously holding that an admiralty court retains jurisdiction over the parties to a limitation proceeding even after it has denied the petitioner both exoneration and limitation of liability, this Court stated (*id.* at 216):

> The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy * * *.

After concluding that the statute must be given "a very broad and equitable construction for the purpose of carrying out its purpose" (*id.* at 215), the Court commented (*id.* at 217):

> If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if not released by virtue of the statute.
>
> Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been construed and enforced. Where

> a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award complete relief * * *.

Both the holding and the language of Chief Justice Taft's *Hartford Accident* opinion were reaffirmed by Chief Justice Hughes speaking for the Court in *Just* v. *Chambers,* 312 U. S. 383, 385–387, also a unanimous decision. Cf. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413–423. It was in the light of this strong mandate for a liberal construction that the court below held that claimants in a limitation proceeding can cross-claim for damages arising out of the same occurrence.

There can be no doubt that, if the United States had not petitioned for limitation of liability, claimants against it in proceedings *in rem* or *in personam* could have cross-libelled one another. Admiralty practice offers the greatest flexibility in allowing both libellants and respondents to cross-libel *inter se* in order to settle finally all rights and liabilities arising from a single marine accident. *The Eliza Lines,* 61 Fed. 308, 324 (C. C. D. Mass.); *The City of Boston,* 182 Fed. 171 (D. Mass.); *The West Katan,* 28 F. 2d 638 (W. D. Wash.). Cf. *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U. S. 629, 636, 637. Thus, if petitioner (and the passenger claimants) had libelled the United States, the United States (and the libellant passengers) could have cross-libelled petitioner by obtaining service on its counsel in the same proceeding. Apart from the limitation petition in this case, therefore, the rights of all parties could have been finally

determined in one proceeding. There appears to be no reason why a different rule should prevail in a limitation proceeding. Indeed, every dictate of modern pleading theory is to the contrary. Cf. *Petition of Texas Co.*, 81 F. Supp. 758 (S. D. N. Y.).

The court below relied on two established principles in deciding that a limitation petition brought by one party to a marine accident does not necessarily result in other libellants in the same proceeding losing the right to claim *inter se:* (a) "all rights, if this can fairly be done, should be decided in a single legal proceeding," and (b) "parties who submit themselves to the jurisdiction of a court * * * should be bound by that court's decision on all questions, appropriate to and seasonably raised in, that proceeding" (Pet. App. 21, 22). Applying these principles, the court concluded that the advantage of ensuring complete disposition of all claims in a single proceeding far outweighed any possible disadvantage to the claimant which is seeking at once to press its claim and also to avoid having to answer for its own fault in the same proceeding. Accordingly, the court below, being conscious of the view taken by this Court in *Hartford Accident* and recognizing the flexible and non-technical nature of admiralty practice, held that Rule 56 allowed the cross-claims between parties already before the court.

This decision has been expressly approved by no less an admiralty court that the Court of Appeals for the Second Circuit in a unanimous opinion holding, on a closely related issue, that a petitioner in limitation could cross-claim against other claimants in the

same proceeding. *Moore-McCormack Lines, Inc.* v. *McMahon,* No. 23960, June 29, 1956, slip opinion, pp. 2–4, 6. The Second Circuit's opinion, which relies on its earlier holding in *The Steel Inventor,* 43 F. 2d 958 (C. A. 2), certiorari denied, 283 U. S. 819, leaves no doubt that it would adopt the result reached by the Fourth Circuit in this case, and the two holdings in combination have the effect of ensuring the same final disposition of all issues in one limitation proceeding as in the ordinary libel *in rem* or *in personam.* Read together, the decisions of the Second and the Fourth Circuits provide an authoritative guide to the procedure to be employed in limitation proceedings.

Nor is there any conflict between the rule of these two decisions and the holding of the Fifth Circuit in *Department of Highways of State of Louisiana* v. *Jahncke Service, Inc.,* 174 F. 2d 894. On the basis of the *Jahncke* opinion and the briefs in that case, the court below concluded that the Fifth Circuit's decision was distinguishable on its facts (Pet. App. 19). In *Jahncke,* a claimant in limitation proceedings sought to implead a third party which had not submitted itself to the jurisdiction of the court by filing a claim against the petitioner. The Fifth Circuit held that the "origin, nature and extension of the third party practice" under Rule 56 indicated that the rule was not intended to permit the impleading of third parties in limitation proceedings. While, arguably, it might be thought desirable that limitation claimants be permitted to implead third parties on claims arising from the same occurrence, such a rule

obviously would raise problems not present in the instant decision which allows cross-claims only against those parties who are seeking recovery on their own behalf and hence are already before the court. Whatever the merits of the *Jahncke* decision, therefore, the issue there decided was entirely apart and distinct from the issue in this case and the Fifth Circuit's ruling is fully reconcilable with the ruling of the court below.[6]

CONCLUSION

The petition in this case raises two factual issues resolved against the petitioner by both lower courts, as well as a question of admiralty procedure which has been decided contrary to petitioner's position by two courts of appeals and on which there is no conflict of decisions.

---

[6] Petitioner also claims (Pet. 17–24) that it is unjust as well as impractical to subject it to suit by service on its counsel as the price for hearing its claim against the United States. The rule sought by petitioner would of course be an exception to the general principle that one seeking recovery in a law suit submits himself to the jurisdiction of the court for purposes of setoff or cross-claim against him with respect to the same occurrence. The short answer to petitioner's argument, however, is that it would be subject to exactly this result in an ordinary libel proceeding, and it has offered no reason, other than its own convenience, why the rule should be different in limitation proceedings. Compare with petitioner's arguments (Pet. 17–24) regarding the practicality of allowing cross-claims, Mr. Justice Holmes' opinion in *The Titanic*, 233 U. S. 718, 731, 734; brushing aside objections that a limitation proceeding involving a foreign vessel might not bar foreign claimants, and Professor Robinson's comment on the same problem (*Admiralty*, p. 904), that "These complications cannot be avoided, so long as 'justice' is a variable in time and place, in an international subject matter like maritime law."

The decisions of the Courts of Appeals for the Fourth and the Second Circuits on the procedural issue are clearly correct, and can be taken to have settled the law on the availability of cross-claims in limitations proceedings. The decisions of the two courts below exonerating the *Haiti* turn on the facts of this particular case, and raise no issues of general importance appropriate for decision by this Court.

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1956.